

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1313

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of John D'Amelio, Contempt
Proceeding Under Title 28, United States
Code, Section 1826a.

UNITED STATES,

Plaintiff-Appellee,

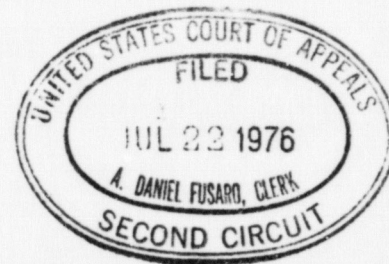
- against -

JOHN D'AMELIO,

Defendant-Appellant.

-----X

APPENDIX FOR DEFENDANT-APPELLANT



PHILIP R. EDELBAUM
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(212) 869-8472

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SUBPOENAS AND HABEAS CORPUS AD TEST.

GRAND JURY AND ORDERS

PROCEEDINGS

v 8-76 IN RE: JOHN D'AMELIO, CONTEMPT PROCEEDING UNDER TITLE 28, U.S. CODE,
SECTION 1826a-Filed Notice of Appeal from an order entered 6-29-76.
Mailed notices to: Hon. Robert B. Fiske, Jr., U.S. Atty., S.D.N.Y.

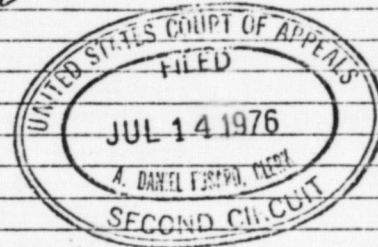
July 8-76 USA -v- JOHN DOE-Filed Affdvt. for W/H/C ad test., for CHARLES WAYNE
ASBY--writ issued ret. 7-21-76.

July 8-76 USA -v- JOHN DOE-Filed Affdvt. for W/H/C ad test., for LESLIE CAMACHO--
writ issued ret. 7-19-76.

July 8-76 IN RE: GRAND JURY SUBPOENA DUCES TECUM 6-21-76-Filed Order dated 7-7-76-
that the sealed envelope attached to the affdvt. of Edward J. Hawie, da
7-2-76, be delivered to the office of the U.S. Atty. for the SDNY.

7-12-76 Filed affidavit (Financial) of John D'Amelio. WARD, J.

7-20-76 Filed order of Judge Bryant finding J. D'Amelio in contempt



A TRUE COPY

RAYMOND J. BUCHARDT

By

Deputy Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :
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-vs- :
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JOHN D'AMELIO, :
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Defendant :
:
-----x

B E F O R E:

HONORABLE WHITMAN KNAPP,
District Judge

New York, New York
June 29, 1976(Room 506)

A P P E A R A N C E S:

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: MICHAEL DEVORKIN, ESQ.,
Assistant United States Attorney

PHILIP R. EDELBAUM, ESQ.,
Attorney for Defendant

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2 (In the robing room.)

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3 MR. DEVORKIN: This is na application for an
4 order of contempt against the witness appearing before
5 the grand jury.

6 In the first place, it is an ex parte proceed-
7 ing and therefore I believe --

8 THE COURT: Is his counsel here?

9 MR. DEVORKIN: It is an in camera proceeding.
10 and I would apply to the Court for persmission to lift the
11 secrecy of the grand jury for the purposes of applying for
12 contempt against the witness who refused to testify.

13 THE COURT: Granted.

14 MR. DEVORKIN: However, I don't think certain
15 people ought to be in the room.

16 THE COURT: If secrecy is lifted, how is having
17 the wife going to effect anybody?

18 MR. DEVORKIN: All right.

19 Will you mark this.

xx 20 (Government's Exhibit 1 received in Evidence.)

21 MR. DEVORKIN: Your Honor, I would like to
22 call as a witness Miss Love.

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M A G N E T I C L O V E, called as a witness
on behalf of the government, being first duly sworn,
testified as follows:

MR. DEVORKIN: Can we mark the stenotype notes
as Government's Exhibit 2?

xx (Government's Exhibit 2 marked for Identification)

EXAMINATION

BY MR. DEVORKIN:

Q Miss Love, how are you employed?

A Official grand jury reporter, Southern District
of New York.

Q Were you so employed and on duty this morning?

A Yes.

Q Were you working with the regular grand jury
panel in the Southern District of New York this morning?

A Yes, I was.

Q Would you just take a look at Government's
Exhibit 2 for Identification?

A Yes.

Q What is Government's Exhibit 2?

A These are my stenographic notes.

MR. DEVORKIN: I would offer them.

THE COURT: These are the notes you made in
your official capacity as a grand jury reporter?

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2 THE WITNESS: Yes.

3 MR. EDELBAUM: No objection.

xx 4 (Government's Exhibit 2 received in Evidence.)

5 Q Miss Love, would you please read for the Court
6 your notes that are marked Government's Exhibit 2 in Evi-
7 dence of the proceedings, part of the proceedings this
8 morning?

9 A This is the second appearance of the witness.
10 The witness was recalled and the foreman of the grand jury
11 reminded him he was still under oath and this is by
12 Mr. Devorkin.

13 "Q Mr. D'Amelio, may I say to you you are still
14 under oath, you understand that?

15 "A Yes.

16 "Mr.Devorkin, may I say something?

17 "Q We will proceed with this and there will be
18 ample time later for you to say whatever you want to.

19 "MR. DEVORKIN: Mr. Foreman, may I have your
20 permission to read the order to the witness?

21 "THE FOREMAN: Yes.

22 "MR. DEVORKIN: Mr. D'Amelio, Judge Knapp of
23 the District Court signed the following order which reads"--

24 THE COURT: You read them the order. You
25 can skip it.

2 I assume it is conceded?

3 MR. EDELBAUM: Yes, your Honor.

4 "Q May the record reflect I have given your attorney
5 a copy of this order. He is seated outside the grand jury
6 room.

7 "Resuming the questions, Mr. D'Amelio, did you know
8 William Zacchi?

9 "A I refuse to answer.

10 "Q Did you understand the order that I have just
11 read to you?

12 "A I understand the situation that I am in.

13 "Q You understand the order that I read to you?

14 "A I have -- I understand.

15 "Q There are rights and you understand that right,
16 that you have immunity and you understand that?

17 "A Yes.

18 "Q Do you understand you have no privilege against
19 self-incrimination after that order was signed?

20 "A Yes, sir.

21 "Q And you still refuse to answer all questions
22 I put to you concerning William Zacchi?

23 "A I am just going to refuse to answer your
24 questions.

25 "Q Do you know William Zacchi?

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"A I am going to refuse to answer your questions,
Mr. Devorkin.

"Q Did you ever sell cocaine to him?

"A I am going to refuse to answer your questions.

"Q Did you ever buy cocaine from anyone else?

"A I am going to refuse to answer your questions.

"Q All right. You may step outside.

"MR. DEVORKIN: Will you excuse the witness.

"THE FOREMAN: You are temporarily excused.

"THE WITNESS: May I say something?

"MR. DEVORKIN: Yes.

"THE WITNESS: You asked about my rent and that,
Mr. Devorkin, you know I got creditors the length of my
arm. You wanted to know how much rent I paid. I lived
with my parents.

"MR. DEVORKIN: Mr. D'Amelio, I really don't
care how much rent you pay. I want to ask you do you know
William Zacchi and whether you either bought or sold cocaine
from him or to him.

"THE WITNESS: I said no, I am refusing to
answer that question. I will refuse to answer any questions.

"MR. DEVORKIN: You are temporarily excused.

"THE WITNESS: Thank you.

"(The witness leaves grand jury room.)"

2 MR. DEVORKIN: Will you continue with the end
3 of that.

4 "MR. DEVORKIN: The foreman and the court
5 reporter will have to go downstairs to the judge.

6 "(The witness was recalled.)

7 "THE FOREMAN: You understand you are still
8 under oath.

9 "THE WITNESS: Yes.

10 "BY MR. DEVORKIN:

11 "Q Mr. D'Amelio, before we proceed further, I just
12 want to clarify a couple of things to make sure that you
13 understand certain things here.

14 "I want to make sure you don't make any decision or
15 anything else without fully understanding all of the cir-
16 cumstances of what you are deciding.

17 "I have talked to your attorney but I want to make
18 clear now a couple of things. You understand that having
19 this order signed means that you cannot be prosecuted for
20 any testimony you may give here in front of the jury, do
21 you understand that?

22 "A I want to refuse.

23 "Q Do you understand that question?

24 "A Yes, sir.

25 "Q Do you understand that if you persist in refusing

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to answer questions after this order has been signed, that you may be sentenced to a term of imprisonment for the length of the grand jury which may be up to 18 months? Do you understand that?

"A Now, yes.

"Q Now, do you still persist? I am referring to answering any questions about William Zacchi.

"A I am just going to just refuse to answer any of your questions, Mr. Devorkin.

"Q Okay. You may be temporarily excused.

"THE FOREMAN: You are temporarily excused.

"THE WITNESS: May I say something?

"MR. DEVORKIN: You may say anything you want to in front of the judge because this is where you are going. Will you step outside, please.

"THE WITNESS: Thank you.

"THE FOREMAN: You are temporarily excused.

"THE WITNESS: Thank you."

MR. DEVORKIN: Your Honor, on the basis of Government's Exhibits 1 and 2 in Evidence, I would ask the Court to hold Mr. D'Amelio in contempt and sentence him to a term of imprisonment for the length of the grand jury before which he appeared this morning and ask he be remanded immediately and I will have a written order for your Honor's

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signature within an hour.

MR. EDELBAUM: Your Honor, this defendant, John D'Amelio, was indicted in Indictment 75 Crim. 1035 which was for conspiracy for the sale of cocaine starting on the First day of September, 1973 up to the date of the indictment. I believe the government will concede this.

MR. DEVORKIN: Yes.

MR. EDELBAUM: I believe the government will also concede that a co-conspirator not named in the indictment was one William Zacchi who was the person in these questions.

THE COURT: I take it Mr. Zacchi hasn't been tried yet?

MR. EDELBAUM: He pled guilty, your Honor. In fact, the overt act was that defendant distributed a quantity of narcotics to another person on October 7. That other person being William Zacchi. On October 10, the other person being William Zacchi. On November 1st, again the person being William Zacchi.

Count 2 substantive count on October 2 he distributed cocaine to another person, that person being William Zacchi.

On Count 3, the 10th day of October, again distributed a quantity of cocaine to William Zacchi.

2 On Count 4, again distributed cocaine to William
3 Zacchi.

4 This case was tried before a jury and before
5 Judge Wyatt. After the government's case, Judge Wyatt
6 dismissed Counts 2 and 3. The defendant was acquitted of
7 Counts 1 and 4. In other words, he was acquitted of con-
8 spiring or distributing to William Zacchi.

9 What the government is now doing is asking, did
10 you do what you were acquitted of doing.

11 Your Honor, there is only one case on this.
12 First of all, your Honor, I claim collateral estoppel. They
13 are collaterally estopped from asking him since the jury has
14 already found --

B2 15 THE COURT: There is a reasonable doubt whether
16 they did or not. That doesn't mean that he didn't do it.

17 MR. EDELBAUM: To then bring him before a grand
18 jury after he has already been acquitted and go through
19 the expense, to bring him before a grand jury is cruel and
20 inhuman treatment.

21 THE COURT: You say this fellow has pleaded
22 guilty?

23 MR. DEVORKIN: Your Honor, Mr. Zacchi pled guilty.

24 THE COURT: Why is the government interested in
25 this information?

2 MR. DEVORKIN: Let me explain.

3 Zacchi pled guilty, was sentenced by Judge
4 Werker, was called to appear before the grand jury, testi-
5 fied before the grand jury that is source of cocaine was
6 Mr. D'Amelio and the grand jury indicted Mr. D'Amelio.
7 Mr. D'Amelio was tried before Judge Wyatt. Mr. Zacchi was
8 supposed to be a witness in that trial. Mr. Zacchi chose
9 instead to go to jail for refusing to testify in a situation
10 identical to the one we are in here now, except we were
11 in front of a jury, not a grand jury.

12 After the acquittal, the defendant was subpoenaed
13 to appear before the grand jury, that is, Mr. D'Amelio, in
14 order to find out where he got the cocaine from that he
15 sold to Mr. Zacchi and that is the purpose of the grand
16 jury's investigation today and Mr. Edelbaum brought a motion
17 to quash the subpoena on the very ground he is arguing to
18 your Honor before Judge Brieant and Judge Brieant dismissed
19 it out of hand.

20 MR. EDELBAUM: That is not what he said. He
21 said he could not act until questions were asked. He had
22 no right to prevent the grand jury but now the questions
23 have been asked.

24 THE COURT: My point is, you want to know where
25 he got the cocaine from?

MR. DEVORKIN: Exactly.

THE COURT: You are not trying to build a case against Mr. Zacchi?

MR. DEVORKIN: No.

MR. EDELBAUM: They want to find out when the defendant was acquitted --

THE COURT: The fact he was acquitted is wholly irrelevant.

MR. EDELBAUM: They are trying to find out where he got the narcotics that he was acquitted of having.

THE COURT: The fact he was acquitted is wholly irrelevant. It merely shows there is a reasonable doubt as to whether or not he is guilty of the narcotics charge. It doesn't stop the government from finding out where he got the narcotics if the government believes he got it. If he didn't get it, he can say he didn't get it from anybody because he didn't have it, then he is subjecting himself to perjury if they can disprove it.

MR. EDELBAUM: If he said he didn't have narcotics then you have a whole trial again on what he was already acquitted of.

THE COURT: You can raise that question in the event that happens.

MR. EDELBAUM: This is becoming very circuitous.

THE COURT: I am not prophecying what will happen at that time. Assuming he now denies he ever had narcotics and the government elects to bring a perjury accusation against him, you may or may not have a point at that trial but that has nothing to do at this present situation.

MR. EDELBAUM: I request that the defendant be served with notice of charges, that he entitled to notice. The summary contempt only applies to contempt actually committed in the presence of the Court. The defendant is entitled to notice.

MR. DEVORKIN: I don't think that is accurate. I think contempt proceedings you can ask the Court under Title 28, Section 26A, there is summary contempt. It is contempt for the life of the proceeding at which the contempt is committed. It is not a criminal contempt, it is a civil contempt.

THE COURT: On that issue I will adjourn the hearing until this afternoon.

MR. EDELBAUM: I can't be here. I am moving my apartment. I live alone. The movers are coming to my apartment at 1:00 o'clock in Westchester.

MR. DEVORKIN: 18 USC 26A, the District Court, here in this District, uses it all the time. It is summary contempt, civil contempt. The man has the keys to the jail

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2 cell, he can let himself out. He is not entitled to any
3 notice whatsoever.

4 THE COURT: I just have a recollection of read-
5 ing a case to the contrary.

6 MR. DEVORKIN: There is a case in the Supreme
7 Court if the government seeks criminal contempt for over
8 6 months, then it has to be done on motion but this isn't
9 that kind of a case. It is civil contempt.

10 MR. EDELBAUM: This has a possibility of a
11 sentence longer than 6 months.

12 THE COURT: The difference between the two --

13 MR. EDELBAUM: I know, he has the keys to the
14 jail, but the possible sentence is longer than 6 months.
15 I believe he is entitled to some written notice.

16 THE COURT: Mr. D'Amelio, you understand that
17 nothing that you say in answer to these questions can be
18 used against you except in a prosecution of perjury. In
19 other words, if you say yes.

20 THE DEFENDANT: I understand what you are tell-
21 ing me, your Honor.

22 THE COURT: If you say I got this cocaine from
23 Joe Blow, they can't prosecute you for having the cocaine
24 nor can they use this testimony as a lead for other evidence
25 against you. In other words, supposing they never heard

1 of Joe Blow from the time you said you got it from Joe
2 Blow. They can't go then and say -- forgetting the fact
3 you have been acquitted -- assume that you said you got it
4 from Joe Blow whom they have never heard of. They go to
5 Joe Blow and say, look what this fellow says about you and
6 he says, true, not only did I give him that cocaine but
7 I sold him cocaine on 10 other occasions for which he hasn't
8 been tried.
9

10 They can't prosecute you for that information
11 they got from Joe Blow as a result of your testimony today.

12 Do you understand what I mean?

13 THE DEFENDANT: Yes.

14 THE COURT: Why do you not want to testify?

15 THE DEFENDANT: When I went to trial -- this
16 is from 1973. I was released. I was held overnight, I was
17 released. December of 1975 I was arrested again for the
18 charges going to 1973. Mr. Devorkin prosecuted the case.
19 I was acquitted. I never got out of the courtroom. I was
20 subpoenaed. This is going on for over 3 years. I have
21 moved back and forth, in and out with my family. I can't
22 pay him. My wife is working like five, six nights a week,
23 what am I supposed to do? For 3-1/2 years I get an apart-
24 ment, this will come and I have to give up the apartment,
25 I have to move in with my parents.

2 THE COURT: Why don't you just tell them what
3 they want to know?

4 THE DEFENDANT: I don't know what they want to
5 know.

6 THE COURT: It is simple, you either did or
7 you didn't.

8 THE DEFENDANT: He took me to trial for it.

9 THE COURT: And you got acquitted and your
10 attorney says if you deny it, they can then prosecute you
11 for perjury. I am not saying you have a defense or not.

12 THE DEFENDANT: He told Judge Brieant that he
13 wasn't even to ask questions --

14 MR. EDELBAUM: No.

15 Your Honor, this defendant was originally
16 arrested in 1973. He was held overnight and released, no
17 formal charges were pressed at that time. Three years later
18 he was indicted on the same charges. He has been going
19 through this for 3-1/2 years. He feels he must take a stand
20 since he was acquitted, that this is harassment. They
21 originally arrested him, they released him, 2 years later
22 they indicted him. He was acquitted. The jury said he
23 was not guilty, he kissed me. He is very emotional. At
24 that point the United States Attorney served him with this
25 subpoena. There is never any end. This is like Jean Val Jean.

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2 He is taking a stand on a principle that he
3 has been acquitted otherwise this can go on forever and
4 the government does not have a right to harass him and
5 to make him suffer through unusual punishment as they are
6 doing.

B3 7 In the event that no notice is required, I
8 would ask, since there is a question on appeal because of
9 the acquittal, that your Honor release him on bail pending
10 appeal or in his own recognizance or to give him a short
11 time to surrender. His father is confined to the hospital.
12 His father is terminal, he has lung cancer, and he is in
13 the latter stages.

14 THE COURT: It seems to me that this has been
15 going on for 3 years, and there is no urgency of getting
16 him in jail today.

17 MR. DEVORKIN: There are two things. There is
18 no issue here for appeal. The acquittal has nothing to do
19 with this.

20 THE COURT: I said it clearly but it doesn't
21 mean I am right.

22 MR. DEVORKIN: If they want to find a case,
23 fine. It is frivolous. There is a case in the Second
24 Circuit.

25 MR. EDELBAUM: I will give the case right now.

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It is US vs Castaldi. It is 338 Federal Second 883, which

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was reversed by the Supreme Court 384 US 886. He was not

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reversed on this ground. There are other grounds but the

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Supreme Court did not reach this ground. It reversed it

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because of procedural problems, that there was a picture

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of civil and criminal contempt at the same time used in the

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proceedings. The Supreme Court never reached the issue

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of whether or not once a person is acquitted, he can be

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then questioned.

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MR. DEVORKIN: If I may continue --

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MR. EDELBAUM: May I finish what I am saying?

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MR. DEVORKIN: You interrupted me.

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MR. EDELBAUM: Also, Castaldi is easily distin-

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guishable from this case. Castaldi was acquitted about a

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year before the grand jury investigation on an indictment

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that happened about 2 or 3 years before that. He was not

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asked specifically about the acts he was acquitted for.

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He was asked about narcotics traffic in general and Castaldi's

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lawyer, Daniel Greenberg, raised the point that once he

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is acquitted of narcotics you cannot ask him about narcotics

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in general. The Court brushed that aside.

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Here you have a different story, you are asking

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him about the exact facts he was acquitted of.

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THE COURT: I don't see that that is a good

defense but I am not the Court of Appeals.

MR. DEVORKIN: The only point is whether the issue is frivolous and the point is it is frivolous and the Castaldi case makes it clear it is frivolous and that is what Judge Brieant said when he talked to Mr. Edelbaum at the time he brought the motion to quash. He said Castaldi doesn't help you at all and it is almost squarely against you.

What is the great rush about putting him in jail if this thing has gone on for 3 years?

MR. DEVORKIN: The time of incarceration, and therefore coercion on the defendant starts running right now with the length of the grand jury having been impaneled a month ago. There is a finite limit on that.

I don't oppose a short delay for medical problems for the defendant's father but the defendant should be remanded as long as he refuses to testify in front of the grand jury. That is the normal procedure in this courthouse, it is done in every case in front of the grand jury. There is no reason in this situation to follow a different course of action. There is no case cited which supports a different course of action.

THE COURT: What do you consider a short delay?

MR. DEVORKIN: If we can hear more about the

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2 health condition.

3 MR. EDELBAUM: Before we go into that, I want
4 to bring one other fact to the Court's attention. This
5 defendant was served with a subpoena on April 9, 1976,
6 returnable on the 26th day of April, 1976. I was available
7 that day. It was adjourned to other days between then
8 and now. For reasons of scheduling of other things before
9 the grand jury, this defendant could have been brought be-
10 fore the grand jury from the 26th day of April until now.
11 At one point I was going away on vacation for a period of
12 a week so that cut out a week between the 26th of April
13 and the 29th of June, two months, so I really don't think --

14 THE COURT: What is the situation with his
15 father?

16 MR. EDELBAUM: His father is terminal. He is
17 in the latter stages. They don't know how long he has to
18 live. It could be a month, it could be two months, it
19 could be less. He is also under treatment now for an in-
20 fection in his mouth. He has had this for a while and he
21 is being treated for that.

22 THE DEFENDANT: He is in Parkchester General.
23 My father is dying. I am the only one that is at home.
24 My wife and I and my mother and my daughter. I am not
25 going any place. You know where to reach me.

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MR. DEVORKIN: That is not the point, respectfully. The point is that the grand jury is entitled to have the man's testimony and he is not entitled to escape the beginning of the 18 months running by spending 6 or 8 or 10 or 12 months outside pending appeal or pending some condition. He should be in jail with that time running.

MR. EDELBAUM: There is nothing in the statute which says a man is not entitled to bail pending appeal.

MR. DEVORKIN: The whole purpose of contempt is to coerce the witness to testify.

THE COURT: I think what I will do is, I will adjourn it for a week. That will give you a chance to get a stay from the Court of Appeals. They may think your case has merit. I doesn't appear so to me.

MR. EDELBAUM: I gather your Honor is going to find the derendant guilty of contempt?

THE COURT: Yes, I have no choice.

MR. EDELBAUM: Could we put this over until the 8th of July?

THE COURT: That is 10 days.

MR. EDELBAUM: Can we have it on the 6th because Monday is a holiday and I will prepare the papers on Tuesday so I would like Wednesday rather than Tuesday.

MR. DEVORKIN: Are we talking about a surrender

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2 date?

3 THE COURT: Yes.

4 MR. DEVORKIN: For the convenience of the Court,
5 since the Part 1 calendar, the criminal calendar is called
6 on Thursday, a week from this Thursday is convenient to
7 the government.

8 THE COURT: The 8th is next Thursday.

9 MR. DEVORKIN: That is fine.

10 MR. EDELBAUM: Yes.

11 MR. DEVORKIN: I will put that date in the
12 contempt order as the surrender date.

13 THE COURT: That will give you a chance to go
14 to the Court of Appeals.

15 In the meantime, between now and the 8th if
16 you serve a brief on me that changes my mind, I will con-
17 sider it.

18 MR. DEVORKIN: Your Honor would you direct the
19 defendant to surrender here in 506 on the 8th?

20 THE COURT: You are so directed.

21 Understand, you have complete immunity for
22 anything you say. If you got the drugs from no one, all you
23 have to do is say so or if you got it from someone, all you
24 have to do is say so. At the time they try to prosecute
25 you for perjury, you may have a point.

* * * *

COPY RECEIVED
JUL 21 1976
ROBERT B. FISKE JR.
U. S. ATTORNEY
SO. DIST. OF N. Y.